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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 574

SAMUEL M. COOMBS, Trustee in Bankruptcy
of the Spier Aircraft Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Supreme Court of the United States

OCTOBER TERM 1943.

No. .

SAMUEL M. COOMBS, Trustee in Bankruptcy
of Spier Aircraft Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Summary Statement of Matter Involved.

1. Petitioner challenges the correctness of a decision by the United States Circuit Court of Appeals for the Third Circuit which affirmed an order (Transcript, p. 5a) of the United States District Court for the District of New Jersey, vacating a temporary restraint which it had issued against the representatives of the United States Government and officers of the United States Navy who had been designated to take possession of property requisitioned under "An Act of Congress of October 16, 1941, as amended by the Act of March 27, 1942, and the Executive Orders of the President" (Transcript, p. 60a), and granted the peti-

tion of the government, directing Samuel M. Coombs, Jr., receiver (now trustee) of Spier Aircraft Corporation, bankrupt, to comply with the order of requisition.

2. The United States Circuit Court of Appeals for the Third Circuit ruled, among other things set forth in its opinion (Transcript, pp. 65-73), that property which had passed into the exclusive custody and control of the Bankruptcy Court for administration was nevertheless subject to requisition and seizure by the government under orders or directives emanating from the Executive branch of the government.

3. On January 22, 1943, a petition in involuntary bankruptcy was filed against the bankrupt in the United States District Court for the District of New Jersey. On January 23, 1943, petitioner was appointed receiver of the bankrupt, and, upon qualifying, took possession of its assets located at No. 200 Central Avenue, Jersey City, Hudson County, New Jersey, where it had been engaged in business in the manufacture of aeronautical parts and equipment intended entirely in aid of the war effort. It was a subcontractor engaged in the manufacture of these articles for prime contractors.

4. The assets which came into the hands of petitioner consisted of a complete plant, in which was set up machinery, equipment, machine tools, wiring, belting and electric installations, constituting a complete manufacturing unit. In addition, there was a lease to the premises, the trade name of the bankrupt, its accounts receivable, good will and other intangible assets.

5. By leave of Court, petitioner conducted the business of the bankrupt to a limited extent.

6. On February 9, 1943, an order of adjudication in bankruptcy was entered.

7. Efforts were made to promote a prompt sale of the bankrupt as a complete unit and going concern, in order to put the plant to its most advantageous use, and to realize the highest possible price therefor. The machinery, tools and equipment, set up as they were, were greatly in demand.

8. In furtherance of the end sought to be attained, and in cooperation with governmental agencies, namely, the War Production Board and the Office of Price Administration, petitioner solicited a bid for the business as a complete entity, resulting in the submission of an offer based on maximum ceiling prices fixed by the office of Price Administration (Transcript, pp. 13a-14a), sponsored by Defense Plant Corporation, a governmental agency, in the name of Simmonds Aerocessories, Inc., to purchase the machine tools and equipment of the bankrupt for the sum of \$132,300.00. The proposal of purchase (Transcript, pp. 13a-15a), stated, among other things, that if accepted, the machine tools and equipment were to be leased by Defense Plant Corporation to Simmonds Aerocessories, Inc. By leave of Court, a hearing was fixed for March 9, 1943, before the Referee, upon notice to all parties in interest, including the War Production Board, the Office of Price Administration, and other governmental agencies, for the consideration of the bid referred to, and any other bids which might be received for all of the assets as a going concern (Transcript, p. 16a).

9. On or about March 6, 1943, the Navy Department served notice of requisition upon petitioner, issued under the statute referred to in paragraph "1" hereof, by the

terms of which certain designated officers were authorized and commanded to take possession of the property mentioned in the requisition, relegating all claimants for compensation for the property in accordance with the methods set forth in the statute.

10. At the time of the requisitioning, petitioner was in possession of the property involved. At no time had he released the same, and he was still in possession on March 9, 1943, when the hearing on the application to consider and accept bids for all of the assets as a complete unit and going concern came on before the Court.

11. On March 9, 1943, immediately prior to the hearing on the application for leave to consider and accept bids, petitioner applied to and obtained from the United States District Court for the District of New Jersey an order temporarily restraining the Secretary of the Navy and his subordinate officers from interfering with the proposed sale of the assets of the bankrupt or from the use of the assets by any purchaser thereof (Transcript, pp. 18a-25a). At the hearing for sale, and before the return of the order to show cause why such temporary restraint should not be made permanent, bids were submitted for the assets in possession of petitioner, and the highest bid was in the sum of \$165,000.00, for the business as a complete unit, free and clear of all claims, liens and encumbrances (Transcript, pp. 26a-37a).

12. Because of the publicity which was incidental to the requisitioning of the property in petitioner's possession, prospective bidders who had theretofore manifested a keen interest in acquiring the business and the assets of the bankrupt as a complete unit and going concern for a

sum substantially in excess of \$165,000.00 refrained from participating, considering their bids to be a mere futility.

13. Thereafter, the United States of America filed a petition with the District Court for an order directing petitioner to deliver possession of the property requisitioned (Transcript, pp. 38a-39a). After argument before the District Court on this petition and on the application of the Trustee for confirmation of the sale (Transcript, pp. 43a-59a), a memorandum opinion was handed down (Transcript, pp. 3a-4a) in which the Court said:

“This memorandum is not presented as an exhaustive study of the questions raised by the receiver. The emergency which is conceded to exist will not permit of an extensive discussion of the questions at this time. The basic question as to the right of the Chief Executive to remove the property in question from the custody of the Court of Bankruptcy is not determined.”

An order was thereupon entered granting the petition of the United States, for leave to remove from the custody and possession of petitioner the machinery and equipment which was the subject matter of the requisition, vacating the temporary restraint which the Court had previously issued and relegating petitioner or his successor trustee to a claim for compensation and damages by reason of the requisitioning and taking of said property and directing the institution of such proceedings for the protection of the rights of all creditors of the bankrupt (Transcript, pp. 5a-7a).

14. Petitioner contends that the determination by the Circuit Court of Appeals below was erroneous and violative of his constitutional rights and in direct conflict with the

decisions of this Court, all of which are more particularly hereinafter set forth.

15. This is a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Third Circuit, and the questions presented for determination upon this petition are set forth in Appendix "B" hereunto annexed.

Reasons Relied Upon for Allowance of the Writ.

1. This case presents questions of constitutional law arising out of the determination in the Courts below, and, which in the first instance found its basis primarily in expediency rather than in legal foundation. Consideration and determination of these questions by this Court is necessary for the future guidance of the various Federal Courts throughout the land.

2. The determination of the United States Circuit Court of Appeals for the Third Circuit in affirming the order of the District Court was in disregard of the rights of petitioner as receiver in bankruptcy and as an officer of the Bankruptcy Court to exclusively liquidate the assets of the bankrupt in the manner provided for by the Bankruptcy Act.

3. Petitioner contends that the Bankruptcy Court having assumed jurisdiction over the *res* upon the filing of the petition in bankruptcy, that such jurisdiction to exclusively deal with the property which had passed into its custody could neither be impaired nor could it be divested thereof by any other branch of the government. This contention is

strengthened by the concession of the government in its brief filed with the United States Circuit Court of Appeals for the Third Circuit in the cause, in which it said:

“It is assuredly fundamental and indisputable that the jurisdiction of the Bankruptcy Court to dispose of the assets of the bankrupt is exclusively within the Court which has the custody of the estate, and, of course, the Court may protect its custody.”

4. It is respectfully submitted that the determination by the United States Circuit Court of Appeals for the Third Circuit is erroneous and not in accord with the principles of applicable decisions in this Court in the following cases:

Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224;
Isaacs v. Hobbs, 282 U. S. 734, 75 L. Ed. 645;
Straton v. New, 283 U. S. 318, 75 L. Ed. 1060.

And, also contrary to:

U. S. v. Wood, 290 Fed. 109 (C. C. A. 2nd Cir.).

5. This Court has ruled that once the Bankruptcy Court acquires custody of property, it may protect that custody in a summary manner, by injunction, and that the right of the Bankruptcy Court was inherent, in it, to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction.

Steelman v. All Continent Corp., 301 U. S. 72;
 81 L. Ed. 1085;
Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railway Co., 294 U. S. 648, 676; 55 Sup. Ct. 595; 79 L. Ed. 1110;
Ex parte, Baldwin, 291 U. S. 610, 615; 54 Sup. Ct. 551; 78 L. Ed. 1020;
Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300;

Everett v. Judson, 228 U. S. 474;
U. S. F. & G. Co. v. Bray, 225 U. S. 205; 32 Sup.
 Ct. 620; 56 L. Ed. 1055.

6. The ruling by the Circuit Court of Appeals below in the case *sub judice* sustaining the order vacating the injunction against the interference with the property which was the subject of the requisition is in apparent conflict with the decisions of this Court in the cases just cited. The decision is also in apparent conflict with the ruling in re

Converse v. Highway Construction Co., 107 Fed.
 (2d) 127 (C. C. A. 6th Cir.);
In re Schermerhorn, 145 Fed. 341 (C. C. A. 8th
 Cir.).

And, contrary to its own decision in re

Roberts Auto & Radio Supply Co. v. Dattle, 44
 Fed. (2d) 159.

7. Petitioner contends that the property of the bankrupt estate having passed within the conceded and indisputable exclusive province of the Bankruptcy Court to fix the value of the property which had thus passed into its lawful custody and which it had never surrendered. Under the determination by the Court below, petitioner was relegated to an adjudication by the Court of Claims of the United States with respect to the value of the property requisitioned and taken, which ruling is in apparent conflict with the decision of this Court in re

U. S. F. & G. Co., v. Bray, *supra*,

where this Court said that the jurisdiction of the Bankruptcy Courts and all proceedings in bankruptcy "is intended to be exclusive of all other Courts * * *".

8. The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard. It is plainly discernable from the record that the Office of Price Administration by the imposition of restrictive price regulations has usurped judicial functions and has unduly extended its activities to the point where the Bankruptcy Court is prevented from selling assets which have come within its custody and control for administration and liquidation for the fair market value thereof.

9. To the extent that the decision below sustained the requisition, upon the theory that the determination that an emergency exists sufficient to justify the taking, cannot be reviewed, it is in apparent conflict with the decision of this Court in re

~~National~~ ^{Mitchell} v. *Harmony*, 54 U. S. 115, 126, 134; 14 L. Ed. 75,

which involved the taking of private property during the Mexican War; and, in which case this Court held that the emergency must be shown to exist before the taking can be justified. That a national emergency existed is not denied. Petitioner made every effort to effect a sale of the business of the bankrupt as a going concern, to the end that the same might produce the articles for which it was equipped. The taking of the major portion of the property of the bankrupt under the requisition approximately four days prior to the hearing on the application to consider the proposal sponsored by the government through its agency, destroyed the business as a complete unit and going concern and was

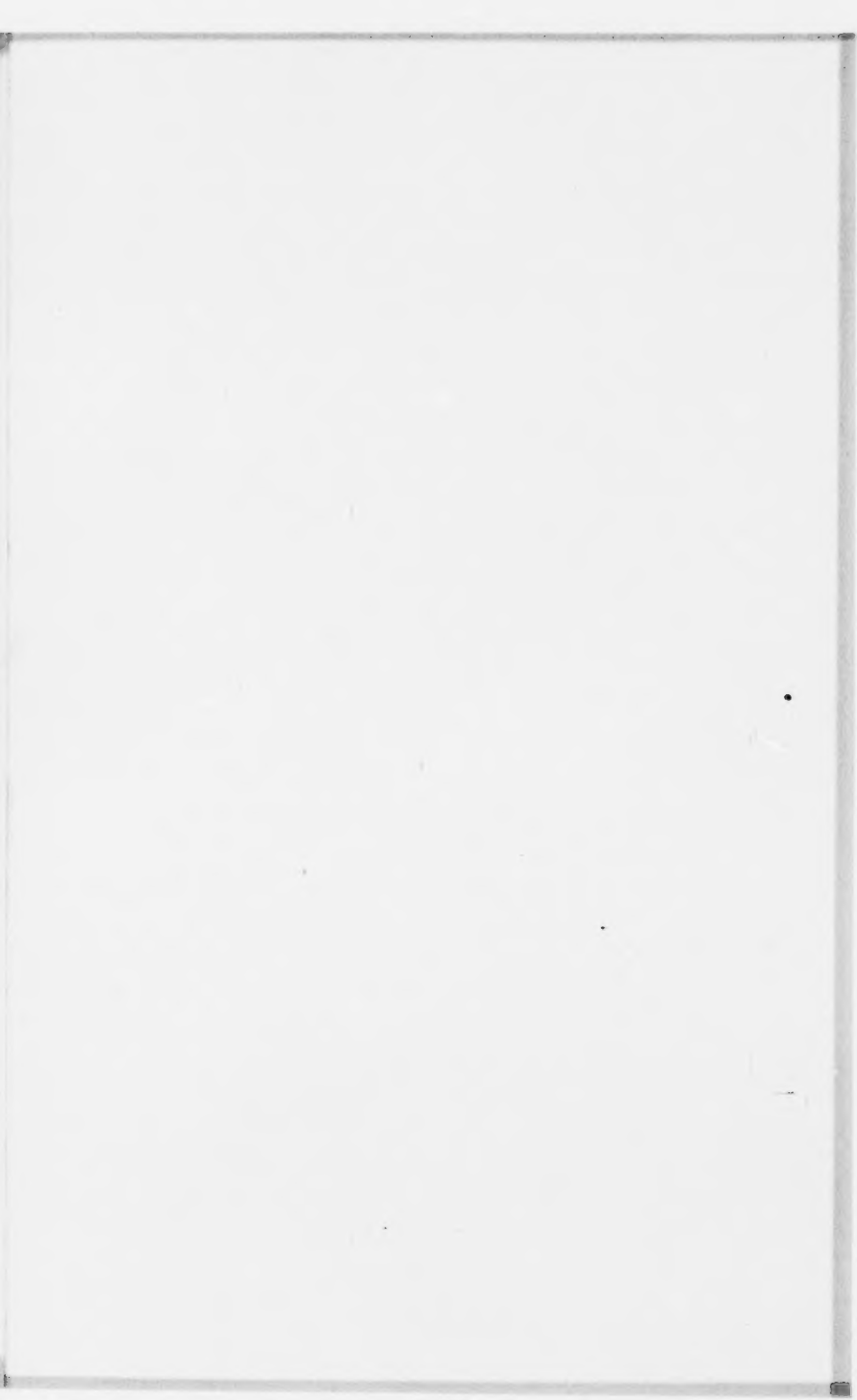
a violation of the rights of the creditors whose interests petitioner was in duty bound to at all times protect.

10. The Circuit Court of Appeals below, in rendering its decision, has decided important questions in a way untenable and in conflict with great weight of legal authority, and is in conflict with the Fifth Amendment to the Constitution of the United States.

11. In the interests of brevity (Rule 38, Paragraph 2), petitioner restricts further discussion on these points, but in order to comply with the rules of this Court, which require that all issues upon which decision is requested be presented in the petition for certiorari, petitioner here refers to and incorporates in this petition all of the matters presented to the United States Circuit Court of Appeals for the Third Circuit in the transcript of the record on appeal, with the same force and effect as if herein set out in full.

WHEREFORE, petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day to be therein named, a transcript of the record and proceedings herein; and, that the decree of the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court; and, your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

MAX L. ROSENSTEIN,
Counsel.





APPENDIX "A".

Constitutional Provisions and Federal Statutes Involved.

1. That portion of the Fifth Amendment to the Constitution of the United States which provides:

"No person shall * * * be deprived of life, liberty, or property, without due process of law."

2. Article I, Section 8, Clause 4 of the Constitution of the United States which gives Congress the power "to establish* * * uniform laws on the subject of bankruptcies throughout the United States."

3. Act of Congress of October 16, 1941 (55 Stat. 742):

§ 721. Requisition of military materials for United States; compensation.

Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and

just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act (section 722 of this Appendix), but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act (section 722 of this appendix), regardless of the amount in controversy in any such proceeding.

Nothing contained in this Act shall be construed—

(1) to authorize the requisitioning or require the registration of any firearms possessed by an individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

(2) to impair or infringe in any manner the right of any individual to keep and bear arms. Oct. 16, 1941, c. 445, § 1, 55 Stat. 742, amended Mar. 27, 1942, 3 p. m., E. W. T., c. 199, Title VI, §§ 601, 602, 56 Stat. 181.

APPENDIX "B".

Questions Presented.

1. Was the jurisdiction which was assumed by the Bankruptcy Court upon the filing of the involuntary petition in bankruptcy so broad, complete and exclusive as to prevent any subsequent action by any other branch of the Government from interfering therewith?

2. If the answer to the first question is in the affirmative, then the question presents itself as to whether the Bankruptcy Court did not have the power to restrain interference with its jurisdiction, which it was exercising in the administration of the assets that had exclusively passed into its custody.

3. Did the Court have the right to inquire into the question whether the conditions precedent fixed by statute under which the requisitions were issued had been met by the Government, and whether in fact all of the means of obtaining the use of the property upon fair and reasonable terms had been exhausted?

4. Was the Executive order under which the requisition was issued in conflict with the Constitution and an encroachment upon the Judicial branch of the Government?

5. The obvious intention and effect of the proceedings below was to limit petitioner to compensation for the requisitioned property to prices fixed by the Office of Price Administration, and not in accordance with applicable recognized and accepted principles. The question to be determined therefore is whether such price fixing limitations followed by seizure under Executive order does not constitute an unlawful invasion of Constitutional rights as guaranteed by the Fifth Amendment.



Supreme Court of the United States

OCTOBER TERM 1943.

No.

SAMUEL M. COOMBS, Trustee in Bankruptcy
of Spier Aircraft Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Third Circuit was rendered August 4, 1943, and is reported in 130 Fed. (2d) 736.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240-A of United States Judicial Code as amended by Act of February 13, 1925, 28 U. S. C. A. Sec. 347-A.

III.**Statement of Case.**

The essential facts in the instant case are fully set forth in the accompanying petition for Writ of Certiorari, and for the sake of brevity are omitted here. All necessary elaboration of the points involved will be made in the Argument which follows.

IV.**Constitutional Provisions and Federal Statutes
Involved.**

A statement of the pertinent portions of the Constitution of the United States will be found in Appendix "A" hereto annexed and made a part hereof.

V.

ARGUMENT.

POINT I.

- (A) The Bankruptcy Court having assumed jurisdiction upon the filing of the petition in involuntary bankruptcy, no subsequent action of any other branch of the government could lawfully divest it thereof, and such jurisdiction could be protected in a summary manner by injunction.
- (B) The right of the Bankruptcy Court is inherent in it to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction.

The application of familiar and accepted principles of law relating to administration of bankrupt estates to the facts in the case at bar make manifest the error in the Courts below. It is fundamental that the filing of a petition in bankruptcy fixes the date from which the sole, exclusive and complete jurisdiction attaches.

Mueller v. Nugent, 184 U. S. 1, 7 A. B. R. 224.

It is likewise fundamental that all property in the actual or constructive possession of a bankrupt, or in which it claims an interest, passes upon the filing of the petition in bankruptcy, into the custody of the Bankruptcy Court; and, that to protect its jurisdiction from interference that Court

may issue an injunction and determine preliminarily all questions concerning possession.

Isaacs v. Hobbs, 282 U. S. 734, 75 L. Ed. 645, 17 A. B. R. (N. S.) 273;
Straton v. New, 283 U. S. 318, 75 L. Ed. 1060, 17 A. B. R. (N. S.) 630;
U. S. v. Wood, 290 Fed. 109 (C. C. A. 2nd Cir.), 1 A. B. R. (N. S.) 36.

In the case last cited, ROGERS, *C.J.*, speaking for the Circuit Court of Appeals, in affirming the District Court, said:

“There can be no doubt that if a private litigant claiming a right to priority of payment out of the assets of a bankrupt had come into a court of equity to assert his right to a preference the District Court would have no jurisdiction to entertain the bill. Under the Constitution and the existing Bankruptcy Act enacted by the Congress the jurisdiction of the courts in bankruptcy in the administration of the estates of bankrupts is complete and exclusive. It is exclusive of all other courts. As the Supreme Court declared in the *United States Fidelity Co. v. Bray*, 225 U. S. 205, 28 Am. B. R. 202, 56 L. Ed. 1055, the jurisdiction of the bankruptcy courts in all proceedings in bankruptcy ‘is intended to be exclusive of all other courts’ and such proceedings include among others ‘the determination of the preferences and priorities be accorded to claims presented for allowance and payment in regular course’. It continued:

“ ‘A distinct purpose of the Bankruptcy Act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have

this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks'."

It will be observed that the government is considered as standing on a parity with private litigants, and has no greater rights by virtue of its being the sovereign, other than the priority which is accorded to it by virtue of Section 64 of the Bankruptcy Act. In all other respects it has no greater rights than that which any other creditor may have in the administration of the estate or any person may have in respect to the property of the bankrupt in the hands of the Court for administration.

In *Isaacs v. Hobbs*, *supra*, Mr. Justice Roberts, speaking for the Supreme Court of the United States, in following *Mueller v. Nugent*, *supra*, declared:

"Upon adjudication, title to the bankrupt's property vests in the trustee with actual or constructive possession, and is placed in the custody of the bankruptcy court. * * * It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. (Citing cases) * * *

"This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent

to hear and determine all questions respecting title, possession and control of the property." Citing *Murphy v. Hofman Co.*, 211 N. S. 562; *Wabash v. Adelbert*, 208 U. S. 38; *Harkin v. Brundage*, 276 U. S. 36.

Indicative of the power of the Court to deal exclusively with the property which has once passed into its custody, and of the lack of power on the part of the Court to surrender that property until it has been properly and fully administered, is the rule laid down by Mr. Justice Roberts when he said in *Isaacs v. Hobbs*, *supra*:

"The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors.

"This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 25 S. Ct. 778, 49 L. Ed. 1157; *In re Schermerhorn* (C. C. A. 8th Cir.), 16 Am. B. R. 507, 145 F. 341. Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate. *U. S. F. G. Co. v. Bray*, 225 U. S. 205, 28 Am. B. R. 207, 32 S. Ct. 620, 56 L. Ed. 1055. The action of the trustee in removing the cause could not, therefore, divest the Texas District Court of its jurisdiction."

That the Bankruptcy Court may protect its jurisdiction by the use of injunctive processes is likewise plain. In

Converse v. Highway Construction Co., 107 Fed. (2d) 127,

the United States Circuit Court of Appeals for the Sixth Circuit dealt with the effect of a petition under Section 77

(b) of the Bankruptcy Act and conflicting requirements of the Norris-LaGuardia Anti-Injunction Act, and said:

“The court was not compelled to observe the inhibitions of 29 U. S. C. A., Sec. 107, and other related sections commonly known as the Norris-LaGuardia Anti-Injunction Act of March 23, 1932 (29 U. S. C. A., Secs. 101-115). The right of the bankruptcy court is inherent to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction. *Continental Illinois National Bank & Trust Company v. Chicago, Rock Island & Pacific Railway Company*, 294 U. S. 648, 676, 27 A. B. R. (N. S.) 715, 55 S. Ct. 595, 79 L. Ed. 1110; *Ex parte Baldwin*, 291 U. S. 610, 615, 24 A. B. R. (N. S.) 487, 54 S. Ct. 551, 78 L. Ed. 1020.”

In *Steelman v. All Continent Corporation*, 301 U. S. 72, 81 L. Ed. 1085, the Supreme Court of the United States said:

“Referring to these statutes, this court has said that ‘the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is * * * inherent in a court of bankruptcy as it is in a duly established court of equity’.”

“The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors.

“This fact places it beyond the power of the court’s officers to oust it by surrender of property which has come into its possession. *Whitney v. Wenman*, 198 U. S. 539, 14 Am. B. R. 45, 25 S. Ct. 778, 49 L. Ed. 1157; *In re Schermerhorn* (C. C. A. 8th Cir.), 16 Am. B. R. 507, 145 F. 341. Indeed, a court of bankruptcy itself is powerless to surrender its control of

the administration of the estate. *U. S. F. G. Co. v. Bray*, 225 U. S. 205, 28 Am. B. R. 207, 32 S. Ct. 620, 56 L. Ed. 1055. The action of the trustee in removing the cause could not, therefore, divest the Texas District Court of its jurisdiction."

In *Collier on Bankruptcy*, 14th Edition, Vol. 1, page 253, the author states the rule at page 254:

"Like any court of equity, once the bankruptcy court acquires custody of property, it may protect that custody in a summary manner by injunction. Section 265 of the Judicial Code (28 U. S. C., Sec. 379), which prohibits issuance of an injunction by any court of the United States to stay proceedings in a state court, expressly excepts 'cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' Citing in *re Hoey, Tilden & Co.*, 292 Fed. 269; *Roberts Auto & Radio Supply Co. v. Dattle*, 44 Fed. (2d) 159, 17 A. B. R. (N. S.) 185 (C. C. A. and 3rd Cir.)."

In *Roberts Auto & Radio Supply Co. v. Dattle*, *supra*, the Court said:

"Consequently, Congress has seen fit to make the jurisdiction of the bankruptcy courts exclusive in the administration and distribution of the assets of a bankrupt, title to which assets vests in the trustee when elected as of the date of filing the petition." Citing *Acme Harvester Co. v. Beckman Lumber Co.*, 222 U. S. 300; *Everett v. Judson*, 228 U. S. 474.

In a discussion of the right of injunction arising out of the Emergency Rent Control Act of 1942, the Circuit Court of Appeals for the Fifth Circuit, in *re*

Henderson, Adm. v. Fleckinger, 136 Fed. (2) 381

said:

“The Federal act, assuming its constitutionality, is a part of the supreme law of the land, and the courts ought to carry it out fully, using the injunctive processes it prescribes.”

This case is cited with approval in re

Brown, Adm. v. Wright, 137 Fed. (2d) 484.

We contend that the Bankruptcy Act, the constitutionality of which has been upheld, should be carried out fully, and the injunctive powers of that Court be fully enforced.

POINT II.

The requisition order could not have legally issued unless the fact had been established that all other means of obtaining the use of the property for the defense of the United States upon fair and reasonable terms had been exhausted.

The statute under which the requisition was issued will be found at page 60a of the Transcript. The record in the Court below shows that petitioner speedily brought on for hearing the proposal made by the government, through Defense Plant Corporation, in the name of Simmonds Aerocessories, Inc., to purchase the machine tools and equipment of the bankrupt for \$132,300.00, and at which hearing other offers for all of the assets of the bankrupt as a going concern would be received.

The language of the statute under which the requisition issued authorizes the requisitioning of property after all

other means of obtaining the use of such property for the defense of the United States, upon fair and reasonable terms, has been exhausted. When the government sought an order against petitioner to deliver the property enumerated in the requisitions, it filed its petition, in which the blanket statement was made that the means required by statute for obtaining the property had in fact been exhausted. This was a conclusion on the part of the government which was utterly unsupported by any facts. It was inconsistent with the actual facts, namely, that at the very time when the requisition was being issued the property involved was the subject matter of the offer to purchase made by the government through its own agency. The positions taken therefore were irreconcilable. The government could not argue that it had been deprived of its day in Court when that day had in fact neither arrived nor been delayed. By the same process of reasoning, the government could not contend that all efforts to obtain the property upon fair and reasonable terms had been exhausted, when the day fixed for the hearing upon its own offer to acquire the same property had not yet arrived.

This is made manifest by the failure of denial that the offer of \$132,300.00 for the requisitioned property was only in the name of Simmonds Aerocessories, Inc., but actually sponsored by Defense Plant Corporation, a governmental agency.

In *Alpirn v. Huffman*, 49 Fed. Supp. 337 (D. Neb. 1943), the underlying principles here involved are discussed. That case involved the taking of personal property, consisting of the contents of a junk yard and equipment at Omaha, Nebraska by the Metals Reserve Corporation, a govern-

mental agency, and inferentially the constitutionality of the Act of October 16, 1941, which is the very Act involved in the present petition, was assailed. The Court in denying an injunction under the particular circumstances existing, at page 340, quoted Chief Justice Taney, in *Mitchell v. Harmony*, 54 U. S. 115, 126, 134, 13 How. 115, 14 L. Ed. 75, which involved the taking of private property during the Mexican War, and said:

“There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and, also, where a military official charged with a particular duty may impress private property into the public service or take it for public use. Unquestionably in such cases, the government is bound to make full compensation to the owner; but, the officer is not a trespasser. But, we are clearly of the opinion that in all of these cases the danger must be immediate and impending; or, the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the case calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend upon its own circumstances. *It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.*” (Italics ours.)

POINT III.

The Executive Branch of the government was without power to issue an order encroaching upon the authority of the Judicial Branch which had already acquired and was exercising complete, sole and exclusive jurisdiction over the subject matter.

The powers of the Bankruptcy Court flow from the Constitution of the United States, which provides that Congress shall have the power to establish uniform laws on the subject of bankruptcies. The doctrine of separation of powers and the encroachment by the Executive and Judicial Departments of the government upon each other, has oft been discussed from the time of *Marbury v. Madison*, 1 Cranch. 137, 177; 2 L. Ed. 60.

In the instant case, however, it was conceded by the government in its brief in the Circuit Court of Appeals below, at page 11 thereof:

“We have no quarrel with and subscribe to the principles stated by the appellant in his brief as to Points I, II, and III. It is assuredly fundamental and indisputable that the jurisdiction of the Bankruptcy Court to dispose of the assets of a bankrupt is exclusively within the Court which has the custody of the estate and, of course, the Court may protect its custody.”

Point I in the brief of petitioner in the Court below was that jurisdiction having once been assumed by the Bankruptcy Court, “no subsequent action of any other branch of the government could lawfully divest it thereof”. This

all inclusive language, concededly correct, of necessity applied to the Executive Branch of the government, as well as to all others. The decision by the Circuit Court of Appeals below extended the force and effect of the right of the Executive Branch of the government to interfere with the lawful and orderly processes of the Judicial Branch of the government, beyond constitutional warrant.

It may be conceded that the Courts have no general supervisory power over proceedings and action of various administrative branches of the government. Any interference by the Courts with the performance of the ordinary duties of the Executive Branch of the government would be productive of nothing but mischief. We concede that the Judiciary cannot properly interfere with Executive action when the Executive officer is authorized to exercise his judgment or discretion. Here, however, the Executive action through the medium of the Secretary of the Navy and his subordinate officers was not discretionary. The Executive action taken was under a statute which prescribes certain fundamental requirements with which there had to be strict compliance before any action could legally be taken thereunder. Any other construction or view would be tantamount to putting the Executive in a position where by order or directive, statutes may be avoided and the rights of private citizens invaded without recourse.

Petitioner contends that Congress intended, in adopting the Bankruptcy Act, to vest in the Courts the power to deal with assets of a bankrupt adjudged as such by Judicial decree. If the course followed in the present instance sanctioned, the effect would be to nullify that power granted by the Constitution and Congress to the Courts, and to do away with due process of law.

If the powers vested in the Bankruptcy Court can in no wise be diminished or encroached upon, it follows that it was the exclusive province of the Bankruptcy Court to fix the value of the property which had once passed into its lawful custody and which it had never surrendered. Consequently, no right existed in the Chief Executive to relegate petitioner to an adjudication by the Court of Claims of the United States with respect to the value of the property requisitioned and taken. *U. S. v. Wood, supra.*

POINT IV.

The application of price fixing limitations of the Office of Price Administration, and the seizure of property, limiting compensation therefor to the prices so fixed, is an unlawful invasion of constitutional rights guaranteed by the Fifth Amendment.

Petitioner contended below (Transcript, p. 55a) that any attempt on the part of the government to fix the price for property sought to be requisitioned, and then actually take the property at the prices so fixed, would be unconstitutional. The proposal of the government, through the medium of Defense Plant Corporation and Simmonds Aerocessories, Inc., distinctly provided that "The price to be paid to be approximately \$132,300.00 more or less, as may be permitted by the Office of Price Administration as the maximum ceiling prices for such machine tools and equipment." (Transcript, p. 14a.)

In *U. S. v. New River Collieries Company*, 262 U. S. 341, 67 L. Ed. 1014, this Court considered the question of

compensation for property confiscated by the government under the Lever Act, and this Court said (at p. 344):

“The ascertainment of compensation is a judicial function, and no power exists in any other department of the government to declare what the compensation shall be, or to prescribe any binding rule in that regard. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 327, 37 L. ed. 463, 568, 13 Sup. Ct. Rep. 622. Where private property is taken for public use, and there is a market price prevailing at the time and place of the taking, that price is just compensation. *L. Vogelstein & Co. v. United States*, decided this day (262 U. S. 337, ante, 1012, 43 Sup. Ct. Rep. 564); *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 80, 81, 57 L. ed. 1063, 1082, 33 Sup. Ct. Rep. 667; *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403, 407, 25 L. ed. 206, 208. More would be unjust to the United States, and less would deny the owner what he is entitled to.”

In *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. 106, 68 L. Ed. 934, cross appeals from judgments of Court of Claims which allowed a portion of the amount claimed for requisitioning by the United States Shipping Board Emergency Fleet Corporation of a contract for the construction of a vessel, were considered by this Court. The determination by the Court below was reversed, and in the course of the opinion this Court, speaking through Mr. Justice Butler, (at p. 123) said:

“It is the property, and not the cost of it, that is protected by the 5th Amendment. *Minnesota Rate Cases (Simpson v. Shepard)*, 230 U. S. 352, 454, 57 L. ed. 1511, 1563, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18. By the taking,

the claimant lost and the United States obtained the right to have the completed ship delivered to it on or before February 1, 1918, upon payment of the installments remaining to be paid under the contract. It is settled by the decisions of this court that just compensation is the value of the property taken at the time of the taking. *L. Vogelstein & Co. v. United States*, 262 U. S. 337, 340, 67 L. ed. 1012, 1014, 43 Sup. Ct. Rep. 564; *United States v. New River Collieries Co.* 262 U. S. 341, 344, 67 L. ed. 1014, 1017, 43 Sup. Ct. Rep. 565; *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299, 306, 67 L. ed. 664, 669, 43 Sup. Ct. Rep. 354; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 341, 37 L. ed. 463, 473, 13 Sup. Ct. Rep. 622. And, if the taking precedes the payment of compensation, the owner is entitled to such addition to the value at the time of the taking as will produce the full equivalent of such value paid contemporaneously. Interest at a proper rate is a good measure of the amount to be added. *Seaboard Air Line R. Co. v. United States*, 261 U. S. 299, 306, 67 L. ed. 664, 669, 43 Sup. Ct. Rep. 354; *United States v. Benedict*, 261 U. S. 294, 298, 67 L. ed. 662, 664, 43 Supp. Ct. Rep. 357; *United States v. Brown*, decided November 12, 1923, 263 U. S. 78, ante, 171, 44 Sup. Ct. Rep. 92."

Petitioner contends that under the law as settled by this Court in the cases just cited, the just compensation to be paid for the property taken is the value of the property at the time of the taking. If the government, through the medium of the Office of Price Administration, is permitted to fix the price at which the property is to be taken, and then take at the price so fixed, such procedure would be contrary to the decisions of this Court and would constitute

an invasion of the rights guaranteed by the Fifth Amendment.

Petitioner has no quarrel with those agencies of the government which were created and are now charged with the responsibility of evolving measures to check inflation or the skyrocketing of prices of commodities essential to the public welfare. The contention is advanced, however, that when an agency of the government, such as the Office of Price Administration, intrudes upon the rights of the public, and in this case the creditors of the bankrupt corporation, and by the imposition of price fixing limitations is thus permitted to permeate, dominate, and in effect unfairly limit and control the measure of compensation to be awarded one whose property has been seized by the government under a War Powers Act, then such acts constitute an invasion of constitutional rights.

Petitioner, in his representative capacity, respectfully contends that any other holding would deprive him of protection against the deprivation of property without due process of law.

Conclusion.

It is respectfully submitted, therefore, that in order that the errors herein pointed out may be corrected and justice done, and the law properly and authoritatively defined, that the judgment of the United States Circuit Court of Appeals for the Third Circuit should be reviewed and reversed, and, to such an end a Writ of Certiorari should be granted.

MAX L. ROSENSTEIN,
Counsel for Petitioner.



2



NO. 571

THE NATIONAL BUREAU OF INVESTIGATION

UNITED STATES DEPARTMENT OF JUSTICE

SAMUEL M. JOHNSON, INMATE OF THE PENITENTIARY,
THE STATE OF ALABAMA

THE UNITED STATES OF AMERICA

OF PENITENTIARY FOR THE STATE OF ALABAMA,
STATE OF ALABAMA,
CHIEF

RECEIVED FOR THE NATIONAL BUREAU OF INVESTIGATION

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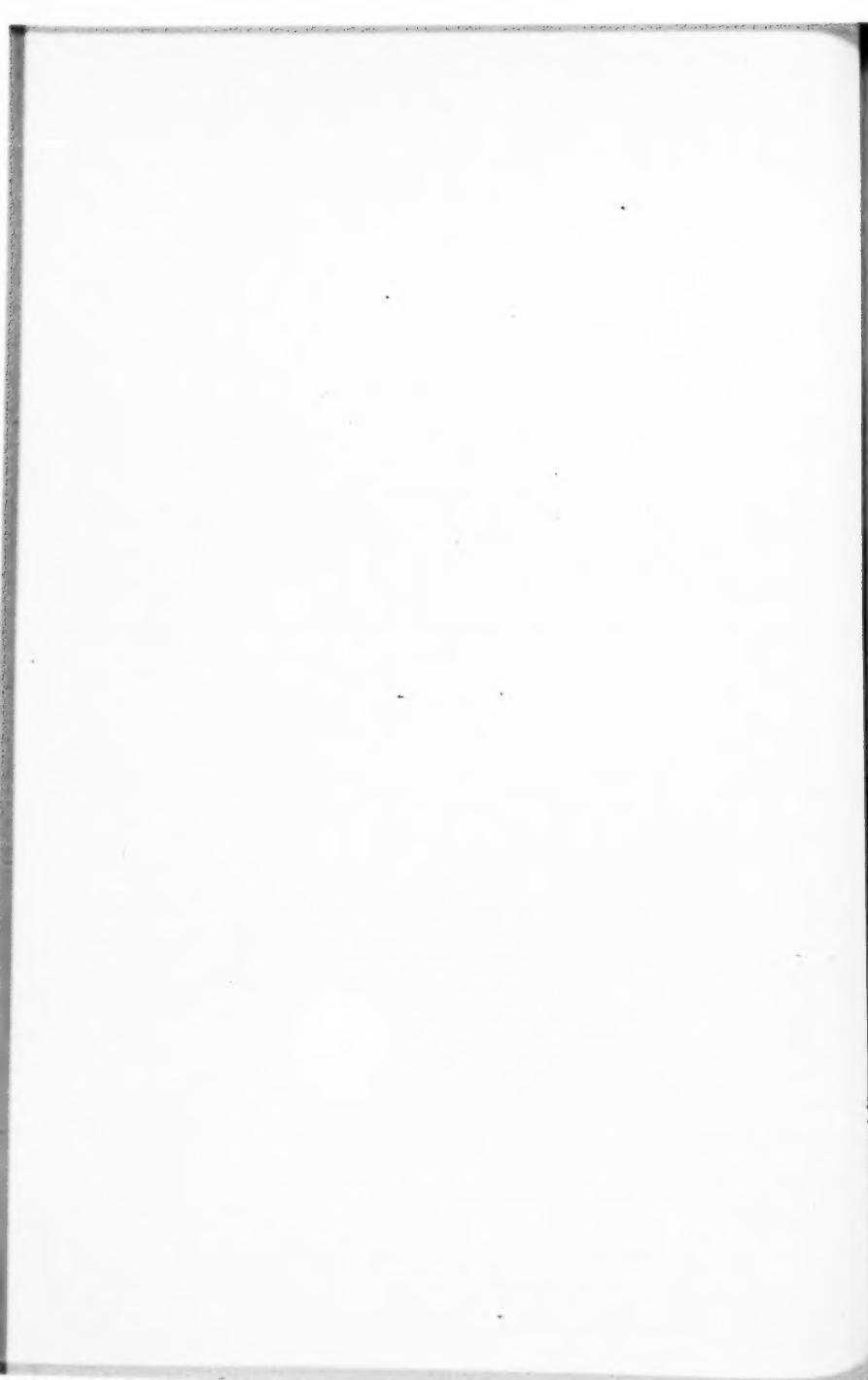
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 574

SAMUEL M. COOMBS, TRUSTEE IN BANKRUPTCY OF
THE SPIER AIRCRAFT CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 3a-4a) is not officially reported. The opinion of the Circuit Court of Appeals (R. 66-72) is reported in 137 F. (2d) 736.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 4, 1943 (R. 72-73). The time within which to file a petition for a writ of certiorari was extended to and including January 3, 1944, by an order of Mr. Justice Roberts filed

November 4, 1943 (R. 74). The petition was filed on January 3, 1944. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is:

Whether a district court of the United States in a bankruptcy proceeding may direct the receiver of the bankrupt estate to turn over to the Government certain property requisitioned pursuant to the Act of October 16, 1941, as amended, and to institute such proceedings under the statute as shall be necessary to the protection of the rights of all the creditors of the bankrupt.

STATUTE INVOLVED

The applicable portions of the statute involved are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

The bankrupt, Spier Aircraft Corporation, was a manufacturer of aeronautical parts and equipment (R. 66). On January 22, 1943, a petition in involuntary bankruptcy was filed against it in the United States District Court for the District of New Jersey (R. 1a). On January 29, 1943, petitioner was appointed receiver of the bankrupt and, upon qualifying, took possession of the assets of the bankrupt located at 200 Central Avenue, Jer-

sey City, New Jersey (R. 1a). The assets which came into the hands of petitioner consisted of a complete plant in which were set up machinery, equipment, tools and electric installations constituting a complete manufacturing unit (R. 18a-19a). On February 9, the Spier Aircraft Corporation was adjudicated bankrupt (R. 1a). Petitioner commenced negotiations for the sale of the bankrupt's property in his possession and received an offer of \$132,300 from Simmonds Aeroaccessories, Inc., which bid was sponsored by the Defense Plant Corporation (R. 11a-15a).

On March 4, 1943, the President of the United States, through his duly authorized representatives, determined, in the manner provided for in the Act of October 16, 1941, as amended by the Act of March 27, 1942, and the Executive Orders issued thereunder, that certain property of the bankrupt was needed for the defense of the United States, that such need was immediate and impending and would not admit of delay or resort to any other source of supply, and that all means other than requisition for obtaining the use of such property for the defense of the United States upon fair and reasonable terms had been exhausted (R. 38a). On or about March 5, 1943, while petitioner was negotiating and arranging for the sale of the bankrupt's assets, the United States served him with notice that in accordance with the Act of October 16, 1941, as amended, and

the Executive Orders of the President thereunder, certain of the bankrupt's machine tools, miscellaneous tools and equipment had been requisitioned (R. 19a-21a). On March 9, 1943, petitioner filed a petition with the District Court, alleging that the attempt to requisition the property was illegal, and seeking an order restraining the officers of the United States Navy, who had been designated to take possession of the requisitioned property, from interfering with the proposed sale of the bankrupt's assets (R. 18a-24a). On the same day the District Court issued a temporary restraining order as prayed, and a rule to show cause why it should not be made permanent, returnable March 10, 1943 (R. 24a-25a). On March 10, the United States filed a petition asking the District Court to direct petitioner to comply with the order of requisition and relinquish possession of the requisitioned property to the Government (R. 38a). The District Court granted the Government's petition and gave it leave to remove from the custody and possession of the receiver all of the property requisitioned (R. 6a). Petitioner was further ordered "to institute such proceedings" under the Act of October 16, 1941 as amended, "as shall be necessary to the protection of the rights of all the creditors of the above named bankrupt" (R. 7a).

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit. Pending the hearing on appeal, the property was taken over by the

Navy Department, was distributed by it, and can never be reassembled (R. 67). The United States moved to dismiss the appeal on the ground that the question raised had become moot. The Circuit Court of Appeals denied the motion because the District Court's order had not only declined to enjoin the Government from requisitioning the bankrupt's property but had also directed the receiver to institute proceedings under the 1941 statute for the protection of the rights of creditors. (R. 67.) The Circuit Court of Appeals thereupon affirmed the order of the District Court.

ARGUMENT

Petitioner seeks to question the validity of the requisition on the ground that it was precluded by the exclusive bankruptcy jurisdiction over the property involved, and because the requisition allegedly did not observe certain statutory and constitutional criteria. Regardless of the merits of his contentions, there is no question of substance for this Court to review, since the relief which petitioner unsuccessfully sought below can no longer be granted. Moreover, the bankruptcy court properly authorized the removal of the property from its custody, thus eliminating the main issue which petitioner attempts to raise. In any event, the decision below was correct on the merits.

1. *There is no real issue of practical importance before this Court.*—(a) The only relief sought by

petitioner in the District Court was an order restraining the representatives of the Navy from interfering with the proposed sale of the bankrupt's assets, that is, from taking the assets by requisition. But the Government, uninhibited by any action of the District Court, has taken the assets; it has distributed them and they can never be reassembled (R. 67). Consequently, even should it be determined that the case was incorrectly decided below, it would be impossible on remand for the District Court to grant petitioner the relief which he originally sought.

While recognizing this, the court below nevertheless thought the case was saved from mootness because the order of the District Court directed petitioner to institute necessary proceedings under the statute "for the protection of the rights of creditors of the bankrupt" (R. 67). But a direction of this kind, hardly necessary in view of a receiver's duty to realize as much as possible from the bankrupt's assets, cannot breathe life into an academic controversy. Assuming that petitioner made out a case for the measure of relief which he sought, the disposal of the property could now leave petitioner with no different remedy than that allowed by the Act of October 16, 1941, under which the requisitioning power was asserted—a suit for just compensation. Indeed, if the taking were invalid because the requirements of the statute were not complied with, as petitioner asserts (Pet. 23-25), the result would be a tort

for which the United States has not consented to be sued. *Hooe v. United States*, 218 U. S. 322, 334-336; *Hughes v. United States*, 230 U. S. 24, 35. The receiver's only recourse at this time being, at most, an action to recover just compensation for the property, there is, in consequence, no real issue before this Court.

(b) There has been no disregard, here, of the jurisdiction of the bankruptcy court. It may readily be conceded that a bankruptcy court has power generally to protect its jurisdiction and the custody of the assets of a bankrupt by injunction. *Steelman v. All Continental Co.*, 301 U. S. 278, 290-291. But nothing was done here in disregard of that jurisdiction. The Government applied to the bankruptcy court for an order directing petitioner to turn over the requisitioned property to representatives of the Navy, and it was pursuant to an order of that court that such property came into the possession of the United States. That this permits the value of the property taken to be determined in a forum other than the bankruptcy court is no more objectionable than allowing value to be determined by competitive bidding, as petitioner desired; of course the Government's obligation to pay just compensation merely took the place of the property requisitioned. Cf. *The Sonora*, 50 F. Supp. 687 (S. D. Tex.).

Courts of bankruptcy have had no difficulty, even where the condemnation of the bankrupt's property took place under powers less urgent than

the war powers of Congress, in recognizing that those courts may properly release the condemned property for an adjudication elsewhere of its value. Cf. *Chicago, R. I. & P. Ry. Co. v. City of Owatonna*, 120 F. (2d) 226 (C. C. A. 8) (railroad condemnation); *Buckhannon & N. R. Co. v. Davis*, 135 Fed. 707, 710 (C. C. A. 4) (railroad condemnation); *City of Norton v. Lowden*, 84 F. (2d) 663 (C. C. A. 10) (condemnation by municipality). Indeed, this Court has recognized the discretionary power of a bankruptcy court to permit the trial in other forums of matters which for one reason or another are adapted to settlement elsewhere. *Thompson v. Magnolia Co.*, 309 U. S. 478, 483; *Foust v. Munson Lines*, 299 U. S. 77. Since the taking here was pursuant to order of the bankruptcy court and with its consent, this case offers no vehicle for consideration by this Court of the question whether property may be requisitioned out of the jurisdiction of a court of bankruptcy against its will.

2. *Property within the custody of a court of bankruptcy is subject to requisition.*—On the merits, the decision below is plainly correct. The power of the Government to requisition property cannot be considered to halt at the doors of the bankruptcy court. Such courts derive their jurisdiction not from the Constitution but from Congress, which has given them the power to protect such jurisdiction against interference by other courts. But this power, inherent in all courts of

equity, is not a limitation upon the authority of the sovereign which created it. In any conflict between a measure designed to promote the war effort and a general statute designed to protect private rights, the former must be considered paramount. Consequently, wherever the question has arisen the lower Federal courts have held that property in the custody of the bankruptcy court is not thereby withdrawn from the power of the sovereign to take it in furtherance of the war effort (*In re Inland Waterways*, 49 F. Supp. 675 (D. Minn.); *United States v. 1.94 Acres of Land*, 51 F. Supp. 162, 165 (M. D. Pa.)), just as property in the custody of a court of admiralty may be requisitioned under the war powers. *The Sonora*, 50 F. Supp. 687 (S. D. Texas); *The Pietro Campanella*, 41 F. Supp. 656 (D. Md.). See Marcus, *Taking and Destruction of Property Under a Defense and War Program*, 27 Corn. L. Q. 317, 476 (1942). In any event, the requisitioning statute, being later than the Bankruptcy Act, can appropriately be deemed a restriction by Congress upon the powers otherwise exclusively reserved to the bankruptcy court.

3. *The requisition order was proper.*—The Act of October 16, 1941, as amended, under which the instant property was taken, provides that machinery, tools and equipment (the class of property here involved) may be requisitioned by the President whenever he determines that such property

“is needed for the defense of the United States,” that “such need is immediate” and “will not admit of delay or resort to any other source of supply,” and that “all other means of obtaining the use of such property * * * upon fair and reasonable terms have been exhausted.” Such determination was made herein by the officials to whom the President had duly delegated his powers under the statute (R. 38a).

Petitioner urges that the facts are not consistent with this determination, and that the property could have been obtained expeditiously and upon fair terms through a bankruptcy sale. But Congress has entrusted to the Executive the determination as to the necessity for resort to the requisitioning power, and such a determination, made in the interest of the war effort (R. 42a), is not reviewable by the courts. *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163; cf. *Hirabayashi v. United States*, 320 U. S. 81, 93; *United States v. Curtiss Wright Corp.*, 299 U. S. 304, 330-331.¹ Moreover, as the court below observed (R. 71), there was no showing of an abuse by the Executive in arriving at the determination that all other means had been exhausted. That the Government had available to it the opportunity to enter into competitive bidding for the property is not inconsistent with such determination, for

¹ *Alpirn v. Huffman*, 49 F. Supp. 337 (D. Neb.); *In re Inland Waterways*, 49 F. Supp. 675 (D. Minn.); *United States v. 1.94 Acres of Land*, 51 F. Supp. 162 (M. D. Pa.).

such an opportunity affords no certainty that the property could be purchased on reasonable terms or even that it could be obtained at all (R. 71).

4. *The taking does not violate the Fifth Amendment.*—Petitioner seeks to attack the fairness of the compensation to be paid for the property prior even to any determination as to what that compensation shall be. The Fifth Amendment of course does not require the fixing or payment of compensation prior to taking. *Hurley v. Kincaid*, 285 U. S. 95; *Crozier v. Krupp*, 224 U. S. 290. Provision is made in the Act for the determination of just compensation upon or subsequent to the taking. It provides that the President shall determine the fair value of the property taken, and if the amount so determined is satisfactory to the owner of the property, it is to be paid to him. If it is unsatisfactory, he may receive 50% of the amount and bring suit in the Court of Claims or in the District Courts of the United States for recovery of an additional amount which he believes necessary to constitute just compensation. All questions of value, including the value of the assets of the bankrupt as a going concern and of the impact thereon of the ceiling price fixed by the Office of Price Administration, are matters properly to be addressed to the courts designated by the statute to determine just compensation. *United States v. New River Collieries*, 262 U. S. 341, 343; *Monongahela Navigation Co. v.*

United States, 148 U. S. 312, 327; cf. *United States v. Grizzard*, 219 U. S. 180 (severance damages). It assuredly may not at this stage be assumed that those questions will be decided in a manner violative of any rights of petitioner under the Fifth Amendment.

CONCLUSION

The case presents no question requiring review by this Court. There is no conflict and the principal question in its present posture lacks substantial importance. We respectfully submit that the petitioner's writ of certiorari should be denied.

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JANUARY 1944.





APPENDIX

Sections 1 and 4 of the Act of October 16, 1941, c. 445, 55 Stat. 742, 743, as amended by the Act of March 27, 1942, c. 199, Sec. 602, 56 Stat. 181 (50 U. S. C. App. 721, 724), provide:

Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1943, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act but each such determination shall be made

as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 (20) and 250) for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. Such courts shall also have power to determine in an appropriate proceeding any questions that may arise with respect to the amount of the fair value to be paid upon the return of any property under section 2 of this Act, regardless of the amount in controversy in any such proceeding.

Nothing contained in this Act shall be construed—

(1) to authorize the requisitioning or require the registration of any firearms possessed by an individual for his personal protection or sport (and the possession of which is not prohibited or the registration of which is not required by existing law),

(2) to impair or infringe in any manner the right of any individual to keep and bear arms.

* * * * *

SEC. 4. The President may issue such rules and regulations and require such information as may be necessary and proper to carry out the provisions of this Act, and he may exercise any power or authority conferred on him by this Act through such department, agency, board, or officer as he shall direct or appoint.